

No. 19,426

United States Court of Appeals  
For the Ninth Circuit

MAX E. TURNER, et al.,

*Appellants,*

vs.

KINGS RIVER CONSERVATION DISTRICT, et al.,

*Appellees.*

*See also  
Vols.  
3318  
3319*

APPELLEES' PETITION FOR REHEARING OR, IN THE  
ALTERNATIVE, FOR MODIFICATION OR CLARIFICATION  
OF THE COURT'S OPINION

BARRETT, WAGNER & DIETRICH,

RICHARD W. DIETRICH,

Suite 1111, Del Webb's Fresno Center,  
Fresno, California 93721,

*Attorneys for Liberty Farms Mutual Water  
Company;*

CROWE, MITCHELL, HURLBUTT & CLEVINGER,

J. THOMAS CROWE,

P. O. Box 110, Visalia, California,

*Attorneys for Alta Irrigation District;*

DOCKER, DOCKER, PERKINS & SHELTON,

WILLIAM F. DOCKER,

418 T. W. Patterson Building,  
Fresno, California 93721,

*Attorneys for Burrel Ditch Company, Kings River  
Conservation District, Liberty Canal Company,  
and Reed Ditch Company;*

FLEHARTY, BERG & GUNTNER,

JOHN M. FLEHARTY,

905 Security Bank Building,  
Fresno, California 93721,

*Attorneys for Crescent Canal Company;*

GREEN & GREEN,

DENSLOW GREEN,

219 South "D" Street,  
Madera, California,

*Attorneys for Tranquillity Irrigation District;*

(Names of Attorneys continued on inside cover)

**FILED**  
*Apr*  
**123 0 1956**

WM. B. LUCK, CLERK

DAN HADSELL,  
3130 Lewiston Avenue,  
Berkeley 5, California,

J. G. McCAIN,  
P. O. Box 475,  
Corcoran, California,

THOMAS K. GREER,  
c/o Salyer Land Company,  
P. O. Box 488, Corcoran, California,

NEWELL AND CHESTER,

ROBERT M. NEWELL,  
Suite 500, Quinby Building,  
650 South Grand Avenue,  
Los Angeles, California 90017.

SWANWICK, DONNELLY & PROUDFIT,

ERNEST M. CLARK, JR.,  
15th Floor, United California Bank Building,  
600 South Spring Street,  
Los Angeles, California 90014,

*Attorneys for Tulare Lake Basin Water Storage  
District;*

CHARLES W. JENNINGS,  
331 "D" Street, Lemoore, California,

*Attorney for Laguna Irrigation District, Empire  
West Side Irrigation District, Riverdale Irrigation  
District, Liberty Mill Race Company, Stratford  
Irrigation District, and Clark's Fork Reclamation  
District No. 2069;*

MADDOX, ABERCROMBIE & KLOSTER,

JAMES K. ABERCROMBIE,  
P. O. Box 549, Visalia, California,

*Attorneys for Cohn Central Consolidated Reclama-  
tion District No. 761, Corcoran Irrigation District,  
Upper San Jose Water Company, and Westlake  
Farms, Inc.;*

J. G. McCAIN,  
P. O. Box 475,  
Corcoran, California,

*Attorney for J. G. Boswell Company, Corcoran  
Irrigation Company, Peoples Ditch Company,  
and Southeast Lake Water Company;*

J. G. McCAIN,  
P. O. Box 475,  
Corcoran, California.

BROBECK, PHLEGER & HARRISON,

ALVIN J. ROCKWELL,  
111 Sutter Street,  
San Francisco, California 94104,

*Attorneys for Tulare Lake Canal Company;*

MILES, SEARS & FRANSON,

WILLIAM M. MILES,  
1202 Guarantee Savings Building,  
Fresno, California,

*Attorneys for Consolidated Irrigation District and  
Kings River Water District;*

ROWELL, LAMBERSON & THOMAS,

BRECKINRIDGE THOMAS,  
619 Rowell Building,  
Fresno, California 93721.

*Attorneys for Kings River Water Association;*

SAVAGE & SHEPARD,  
RICHARD L. SHEPARD,  
915 Helm Building,  
Fresno, California,  
*Attorneys for Stinson Canal & Irrigation Company,  
James Irrigation District, and Dick Lovelace;*

STAMMER, MCKNIGHT, BARNUM, BAILEY & BARNETT,  
GALEN MCKNIGHT,  
700 Guarantee Savings Building,  
Fresno, California,  
*Attorneys for Fresno Irrigation District; and*

WALCH, GRISWOLD, BRADEN & DITTMAR,  
LYMAN GRISWOLD,  
SHARP, SHARP & MAROOT,  
SIDNEY J. W. SHARP, JR.,  
311 North Douty, Hanford, California,  
*Attorneys for Last Chance Water Ditch Company,  
Appellees and Petitioners.*



## Subject Index

---

	Page
1. No decision of general application as to Section 8, which could serve as a precedent where the question of governmental immunity is not involved, is necessary in the present case .....	3
2. While the court properly assumed the applicability of Section 8 for purposes of testing the complaint on the question of governmental immunity, no decision of general application as to Section 8 would be appropriate in this proceeding .....	5
Conclusion .....	9

---

## Table of Authorities Cited

---

Cases	Pages
Federal Home Loan Bank of San Francisco v. Hall, 225 F. 2d 349 (Ninth Cir. 1955).....	7
Fibreboard Paper Prod. Corp. v. East Bay U. of Mach., Loc. 1304, 344 F.2d 300 (Ninth Cir. 1965).....	7
Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949)	3
United States v. Causby, 328 U.S. 256 (1946).....	5
United States v. Kansas City Insurance Co., 339 U.S. 799 (1950) .....	5
United States v. Virginia Electric & Power Co., 365 U.S. 624 (1961) .....	5
Youngstown Co. v. Sawyer, 343 U.S. 579 (1952).....	5

## Statutes

Flood Control Act of 1944:	
Section 8 .....	1, 2, 3, 5, 6, 7, 8, 9
Section 10 (58 Stat. 887, 894) .....	2, 3, 4, 5, 6, 8, 9

## Attorney General's Opinions

41 Ops. Atty. General 377 .....	9
---------------------------------	---

## Rules

Rules of the Court, Rule 23 .....	10
-----------------------------------	----



No. 19,426

**United States Court of Appeals  
For the Ninth Circuit**

---

MAX E. TURNER, et al.,

*Appellants,*

vs.

KINGS RIVER CONSERVATION DISTRICT, et al.,

*Appellees.*

**APPELLEES' PETITION FOR REHEARING OR, IN THE  
ALTERNATIVE, FOR MODIFICATION OR CLARIFICATION  
OF THE COURT'S OPINION**





*To the Honorable Oliver D. Hamlin, James R. Browning, and Ben. C. Duniway, Circuit Judges:*

This petition is filed by the Kings River Water Association, the Kings River Conservation District, and the other undersigned Districts and Water Companies, and one individual, joined as defendant-appellees herein (referred to as "petitioners"). The Court's opinion may be construed to hold, as a matter of generally applicable law, that Section 8 of the Flood Control Act of 1944 is applicable to Pine Flat Dam. Any such construction is a matter of grave concern to petitioners, who most earnestly submit that Section 8 does not so apply. Their position will be fully presented in *United States v. Tulare Lake Canal Company* and *Tulare Lake Basin Water Storage District* (Intervenor), pending in the United States District Court for the Southern District of California, No. 2483-ND, Civil, in which case this very question of applicability of Section 8 and of Reclamation law is in issue.<sup>1</sup>

A holding of general application that Section 8 and Reclamation law apply to Pine Flat Dam is both unnecessary and inappropriate (as well as, we believe, erroneous) in the present case, where it is *not* in issue, and such question should be left for decision in the above cited pending case, where it *is* one of the major issues between the United States Government and the Tulare Lake Canal Company, and where it will be decided after full opportunity for *both* sides to be heard. This Court's opinion should not be left subject

---

<sup>1</sup>This is the litigation referred to in the Department of Justice brief, pp. 53-54.

to the construction that any such holding was intended here.

At page 10 of the print of the Court's opinion, the second paragraph begins:

“Section 8 of the Flood Control Act of 1944 authorizes the Secretary of Interior to operate and maintain structures such as Pine Flat Dam ‘under the provisions of the Federal Reclamation laws (Act of June 17, 1902, 32 Stat. 388 and Acts amendatory or supplementary thereto),’ thus making all of the provisions and limitations of the Reclamation law applicable to the irrigation features of the Pine Flat project.”

As just stated and as we show under point 2 below, the applicability of Section 8 was, in fact, not in controversy in the present case and the issue of its applicability involves highly controversial questions of great significance. What we urge is that the Court make clear beyond the possibility of misconstruction that it simply “assumes,” *arguendo*, for purposes of the instant case, the applicability of Section 8 and of Reclamation law.

In order to make our own position perfectly clear: We do not, of course, disagree with the Court's affirmation of dismissal. Nor, “assuming” the applicability of Section 8 of the Flood Control Act, do we disagree with the Court's conclusion that it remits appellants to the Court of Claims. We believe (1(b), below) that Section 10 of that Act likewise directs appellants to the Court of Claims for any remedy to which they may be entitled.

1. NO DECISION OF GENERAL APPLICATION AS TO SECTION 8, WHICH COULD SERVE AS A PRECEDENT WHERE THE QUESTION OF GOVERNMENTAL IMMUNITY IS NOT INVOLVED, IS NECESSARY IN THE PRESENT CASE.

(a) In dealing with the defense of governmental immunity, the Court concluded that it must decide whether the acts of appellee officials exceeded their statutory authority "in the respects alleged by appellants," noting the admonition of the Supreme Court that "*. . . it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies.*" (Op., p. 7, including fn. 6; emphasis, this Court's.)<sup>2</sup>

Appellants' first cause of action relied entirely, and its second cause of action partly, on the preamble and on Section 8 of the Flood Control Act of 1944, it being the theory of the complaint that Section 8 served to make Reclamation law applicable to the irrigation uses of Pine Flat Dam. (Op., pp. 2-5.) Whether appellants were right or wrong in invoking Section 8 and Reclamation law, it is a complete answer for the Court to demonstrate that, *assuming* Section 8 applied, defendant officers were not exceeding their statutory authority in the alleged acts of which appellants had standing to complain. The opinion stated in detail the basis for its conclusion that Section 8 could not entitle appellants to relief in this proceeding. (Op., pp. 10-14, 14-17.)

(b) Appellants' second cause of action relied, also, on Section 10 of the 1944 Act. (Op., p. 5.) Here, too,

---

<sup>2</sup>*Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 690 (1949).

whether the irrigation uses of the Pine Flat Dam are determined by Section 10 (Army Engineers) or Section 8 (Bureau of Reclamation), it is sufficient for the Court to show that, in either case, and under either section (read in context and giving full force to appellants' contention as to the effect of the preamble), appellants could not prevail. The Court's opinion demonstrated that under Section 10 defendant officials were acting within their statutory authority. (Op., pp. 10-11, 14-17.) As the Court correctly concluded, with supporting reasons, referring to the Reports of both the Corps of Engineers and the Bureau of Reclamation, "we find no convincing evidence that Congress intended to prohibit absolutely any interference by appellee officials with downstream riparian rights" incident to the proposed operation. (Op., p. 15.) So far as Section 10 is concerned, the significant reference here is to the Report of the Corps of Engineers, which Congress expressly approved, with one exception, in authorizing the Pine Flat project.<sup>3</sup>

In résumé, a decision as to whether Reclamation law is or is not applicable to the Pine Flat project is unnecessary to the decision in this case because:

---

<sup>3</sup>The exception related to the "conditions of local cooperation," which the Court dealt with in its opinion (p. 21). Under the relevant provisions of Section 10, as set forth in the Court's footnote 24, page 21, it was the Corps of Engineers (not the Bureau of Reclamation, whose Report Congress did not accept) that Congress there authorized to build and operate the Pine Flat Dam and to make arrangement for payment "either in lump sum or annual installments, for conservation storage when used." And it is the Corps of Engineers in fact who built the dam and today operate it. It is about their operation of the dam that appellants complain. See e.g., Appellants' Opening Brief, p. 27; Reply Brief, p. 35.

(i) If Reclamation law does apply, it applies in its entirety so that appellants' remedy is an action for damages in the Court of Claims. (Op., pp. 10-14, 14-17.)

(ii) If Reclamation law does not apply, the acts of which appellants complain are most certainly not prohibited, for the appellee officers possess ample authority to operate the project under the provisions of the Flood Control Act of 1944. (Op., pp. 10-11, 14-17.)<sup>4</sup>

---

2. WHILE THE COURT PROPERLY ASSUMED THE APPLICABILITY OF SECTION 8 FOR PURPOSES OF TESTING THE COMPLAINT ON THE QUESTION OF GOVERNMENTAL IMMUNITY, NO DECISION OF GENERAL APPLICATION AS TO SECTION 8 WOULD BE APPROPRIATE IN THIS PROCEEDING.

(a) A definitive holding as to Section 8 should be made only after this Court has heard *both* sides of the argument, which was not true here. Appellants asserted and relied on the alleged applicability of Section 8 to the Pine Flat project, and the Department

---

<sup>4</sup>The Corps of Engineers has broad authority, similar to that of the Bureau of Reclamation, to acquire the interests in property necessary for their undertakings, and when rights are taken pursuant to authority, compensation is provided by suit in the Court of Claims (Op., p. 17), *Youngstown Co. v. Sawyer*, 343 U.S. 579, 632, fn. 2 (1952, Concurring Opinion of Douglas J.) and cases there cited, including *United States v. Causby*, 328 U.S. 256 (1946).

See also *United States v. Kansas City Insurance Co.*, 339 U.S. 799 (1950) and *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961), the latter case involving the operation of a dam and reservoir on the Roanoke River which was authorized by Section 10 of the Flood Control Act of 1944, 58 Stat. 887, 894.



of Justice, in behalf of appellee officials, joined in this assertion. The remaining appellees, including all of the petitioners, considered it unnecessary even to refer to Section 8 and, to the extent that the statutory and constitutional authority of appellee officials was considered, sustained their actions under Section 10 of the 1944 Act.<sup>5</sup> Accordingly, from the nature of the case to this point, the Court has heard only one side of the Section 8 argument.

(b) On the other hand, the application of Section 8 to Pine Flat Dam is squarely in issue between plaintiff and defendant and intervenor in the *Tulare Lake Canal Company* case, above cited. For present purposes, Justice's description of that litigation, and its immense importance and wide consequences (Justice Dept. br., pp. 50-54, also p. 5, fn. 1), may be accepted as adequate, except that constitutional questions not heretofore decided are also presented. We particularly invite the Court's attention to the Government's correct statement:

“The answer which the Canal Company has filed presents for judicial determination . . . also

---

<sup>5</sup>The Department of Justice did not, however, trust all its eggs to the Section 8 basket. On the contrary, it stated under “Statutes Involved” (Br., p. 2): “The appellee officers of the United States assert that the only statute involved is Section 10 of the Flood Control Act of 1944, 58 Stat. 887, 891, 901.” The Justice brief referred to “the somewhat ambiguous language of Section 8” (p. 14), and to the fact that whether the excess land provisions of Reclamation law apply to the Pine Flat Dam “has long been in dispute” and was not “finally resolved”—that is, within the Executive Branch of the Government—until the Attorney General’s opinion of 1958 (p. 51). At one point the brief argues (and we believe correctly) that the specific language of Section 10 of the 1944 Act must control “the more general language of Section 8” (p. 57). Also see the Department of Justice brief at pp. 12, 16-17, 18, 32-33, 64-65.

the issue whether the acreage-limitation provisions of federal reclamation law are applicable at all with respect to the project'' (Justice Dept. br., p. 54, fn. 7).

Plainly, that litigation—and not the present case—is the proper vehicle for the definitive Section 8 decision.<sup>6</sup> The Court may take judicial notice of that litigation and the pleadings and papers therein. *Federal Home Loan Bank of San Francisco v. Hall*, 225 F.2d 349, 354-355 (Ninth Cir. 1955); *Fibreboard Paper Prod. Corp. v. East Bay U. of Mach.*, *Loc. 1304*, 344 F.2d 300, 302, fn. 2 (Ninth Cir. 1965). The attorneys for said Company and intervening District in the *Tulare Lake Canal Company* case, who have not previously participated on behalf of said Company and District in the present litigation, have assisted in the preparation of this petition and are now joined as attorneys of record.

(c) The present case was decided, and affirmed, on the complaint alone. (Op., p. 1.) In petitioners' view, there exist highly significant guides to the proper construction of Section 8 not yet called to the attention of this Court and some of which can be presented only in the form of evidence, of which the Court would not take judicial notice. Such evidence includes proof as to the contemporaneous understanding of Section 8 by the Bureau of Reclamation itself, and is presently the

---

<sup>6</sup>There is certainly room for argument that even if Section 8 applies to the Pine Flat Dam, the acreage limitation provisions of Reclamation law do not apply, either as a matter of statutory construction or constitutional authority. Petitioners' first position, however, is that as a matter of statutory meaning Section 8 has no application.

subject of various interrogatories addressed to the United States, which the District Court, overruling objections, has ordered the United States to answer by April 15, 1966. Clearly, the application of Section 8 should be decided only on a complete record.<sup>7</sup>

If this Court's decision is allowed to stand in its present form and is construed by the District Judge in the pending *Tulare Lake Canal Company* case as a direct holding that Reclamation law applies to the Pine Flat project, the District Judge in that case may well feel bound by such holding, to the extent that he will refuse to allow evidence or argument by the defendant Tulare Lake Canal Company and intervenor on the subject, thus foreclosing a full adversary hearing on this extremely important issue which the Government itself has agreed in its contracts with these petitioners should be judicially determined after

---

<sup>7</sup>Among the guides to the construction of Section 8 referred to in this paragraph are, we believe, the proceedings of Governor Warren's Water Conference of December, 1945, participated in by both the Corps of Engineers and the Bureau of Reclamation; correspondence between official representatives of the State of California and the Corps and Bureau; the repeated, unsuccessful efforts of the Bureau to have the Pine Flat Dam reauthorized as a reclamation project, over the objections of the State of California and the Kings River water users; the fact that the Bureau assumed authority to negotiate Kings River contracts not by virtue of the 1944 Act as such but on the basis of a Presidential executive order of May 2, 1946 (which order, however, confusingly left the negotiation of contracts on other California projects authorized by the 1944 Act in the hands of the Corps of Engineers); and the fact, referring to the provisions of Section 8, that no "such additional works", therein referred to, have ever been constructed at Pine Flat Dam, that no determination or recommendation, as therein provided, has ever been made, the Congress itself having made such determination, upon the recommendation of the Corps of Engineers, in Section 10 of the Act, and that no part of the Pine Flat Dam is or ever has been operated or maintained by the Secretary of the Interior or the Bureau of Reclamation.



a full hearing on the merits. On the other hand, even if the District Judge in that case does not construe the language of this Court's decision as holding as a matter of generally applicable law that Reclamation Law does apply to the Pine Flat project to the extent that he will reject evidence or argument on the issue, he might well feel sufficiently bound by this Court's unqualified language so as to render an adverse decision, even though he had before him substantial evidence that Reclamation Law does not apply and that the opinion of the Attorney General (41 Op. A. G. 377), which is itself in issue in the *Tulare Lake Canal Company* case, was incorrect.

---

### CONCLUSION

(1) The Court should modify or clarify its opinion as to the application of Section 8 in the respect set forth in the third paragraph of this petition, page 2, above. Without attempting to presume as to the language which the Court might use, the substance of our point would be satisfied if the following were substituted for the first sentence of the second full paragraph at page 10 of the opinion:

“If we assume that Section 8 of the Flood Control Act of 1944 authorizes the Secretary of the Interior to operate and maintain structures such as Pine Flat Dam ‘under the provisions of the Federal Reclamation laws (Act of June 17, 1902, 32 Stat. 388 and Acts amendatory or supplementary thereto),’ and thus makes all of the provisions and limitations of the Reclamation law

applicable to the irrigation features of the Pine Flat project, the appellee officials would nevertheless be authorized to interfere with appellants' rights in the manner alleged in the complaint."

(2) As a less desirable alternative, since among other reasons the record in the present case is not complete, the Court should grant a rehearing and enable all parties to file additional briefs with respect to the application of Section 8 of the Flood Control Act of 1944 to Pine Flat Dam, followed by oral argument.

(3) If alternative (2) is followed, petitioners suggest, pursuant to the last paragraph of Rule 23 of the Rules of this Court, that further hearing be had before the Court *en banc*.

Dated, April 7, 1966.

Respectfully submitted,

BARRETT, WAGNER & DIETRICH,  
RICHARD W. DIETRICH,  
*Attorneys for Liberty Farms Mutual Water  
Company;*

CROWE, MITCHELL, HURLBUTT & CLEVINGER,  
J. THOMAS CROWE,  
*Attorneys for Alta Irrigation District;*

DOCKER, DOCKER, PERKINS & SHELTON,  
WILLIAM F. DOCKER,  
*Attorneys for Burrel Ditch Company, Kings River  
Conservation District, Liberty Canal Company,  
and Reed Ditch Company;*

FLEHARTY, BERG & GUNTNER,  
JOHN M. FLEHARTY,  
*Attorneys for Crescent Canal Company;*

GREEN & GREEN,  
DENSLOW GREEN,  
*Attorneys for Tranquillity Irrigation District;*

DAN HADSELL,  
 J. G. McCAIN,  
 THOMAS K. GREER,  
 NEWELL AND CHESTER,  
 ROBERT M. NEWELL,  
 SWANWICK, DONNELLY & PROUDFIT,  
 ERNEST M. CLARK, JR.,  
*Attorneys for Tulare Lake Basin Water Storage  
 District;*

CHARLES W. JENNINGS,  
*Attorney for Laguna Irrigation District, Empire  
 West Side Irrigation District, Riverdale Irrigation  
 District, Liberty Mill Race Company, Stratford  
 Irrigation District, and Clark's Fork Reclamation  
 District No. 2069;*

MADDOX, ABERCROMBIE & KLOSTER,  
 JAMES K. ABERCROMBIE,  
*Attorneys for Cohn Central Consolidated Reclama-  
 tion District No. 761, Corcoran Irrigation District,  
 Upper San Jose Water Company, and Westlake  
 Farms, Inc.;*

J. G. McCAIN,  
*Attorney for J. G. Boswell Company, Corcoran  
 Irrigation Company, Peoples Ditch Company,  
 and Southeast Lake Water Company;*

J. G. McCAIN,  
 BROBECK, PHLEGER & HARRISON,  
 ALVIN J. ROCKWELL,  
*Attorneys for Tulare Lake Canal Company;*

MILES, SEARS & FRANSON,  
 WILLIAM M. MILES,  
*Attorneys for Consolidated Irrigation District and  
 Kings River Water District;*

ROWELL, LAMBERSON & THOMAS,  
 BRECKINRIDGE THOMAS,  
*Attorneys for Kings River Water Association;*

SAVAGE & SHEPARD,  
 RICHARD L. SHEPARD,  
*Attorneys for Stinson Canal & Irrigation Company,  
 James Irrigation District, and Dick Lovcluce;*

STAMMER, McKNIGHT, BARNUM, BAILEY & BARNETT,  
 GALEN McKNIGHT,  
*Attorneys for Fresno Irrigation District; and*

WALCH, GRISWOLD, BRADEN & DITTMAR,  
 LYMAN GRISWOLD,  
 SHARP, SHARP & MAROOT,  
 SIDNEY J. W. SHARP, JR.,  
*Attorneys for Last Chance Water Ditch Company,  
 Appellees and Petitioners.*

## CERTIFICATION

I certify that the foregoing petition, in my judgment, is well founded, and that the same is not interposed for delay.

BRECKINRIDGE THOMAS,  
*Of Counsel for Above Named  
Appellees and Petitioners.*